Task Force review of the Yukon Workers' Compensation Act

Phase 2

— Options Paper —

June 1999

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Preface

As you consider this Options paper, please keep in mind three things.

First, the Task Force has used the *Workers' Compensation Act* as the 'jumping off' point for the review. In some situations, the Workers' Compensation, Health and Safety Board (WCHSB) has developed, or is in the process of developing, policies, rules or procedures that complement and expand upon what presently exists in the Act to provide more clarity and certainty in the compensation system.

The focus of the Task Force has been to consider the legislation and not these policies, rules and procedures. Consequently, some of the options suggested in the Options Paper may reflect what the board is already doing or is planning to do as a result of their policy research and development.

Where the policy work of the board supports the comments that we receive from stakeholders on any particular option, the intention will be to provide greater legal support for the policy or to recommend policy changes, whichever is appropriate. Where the comments received from stakeholders deviate from existing board policy or address areas that are not presently the focus of policy direction, the legislative amendments proposed by the Task Force will be designed to provide, as much as possible, an adequate legislative foundation to ensure that the options selected are effectively implemented as part of the overall workers' compensation system.

Second, as you read the Options Paper, be aware that each issue is a building block intended to improve the overall compensation system. No single issue can address all concerns and many of the issues are inter-related. Think about these linkages as you read and consider how the options can work together to address the fundamental interests and concerns you have about the workers' compensation system.

Third, the options are not presented as alternatives. In some situations, it may be appropriate to select Option 1 or Option 2; in other situations, selection of more than one option may be appropriate.

On behalf of the Task Force, I thank you in advance for your interest and participation in this process.

Laurie A. Henderson,
Task Force Chair
Workers' Compensation Act review

A note on the use of the words 'Board' and 'board'

Confusion exists on how to differentiate between the Workers' Compensation, Health and Safety Board administration (staff) and its Board of Directors when each is referred to by the word 'board'.

The *Workers' Compensation Act* defines the word 'board' simply as

> "The Workers' Compensation Board continued as the Workers' Compensation, Health and Safety Board under this Act".

In other words, the definitions section of the Act does not differentiate between 'board' administration and the Board of Directors when either is referred to as the 'board'. Consequently, when the term 'board' is used throughout the Act, it may refer to either the administration or the directors, depending on the context of the section.

The administration of the board have come to use the spelling 'board' to refer to administration and staff and to use the spelling 'Board' to refer to the directors. This is the style that is used in this Options Paper, except in the references to the *Workers' Compensation Act* where the spelling 'board' is used throughout to be consistent with the legislation as it is printed.

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Introduction

About the Task Force review:

This Options Paper is the second phase of the 1999 review of the Yukon *Workers' Compensation Act*. It follows the Phase 1 Issues Paper released March 1999.

The Phase 2 Task Force meeting on the Options Paper will take place on June 17 and 18 at the High Country Inn in Whitehorse. Each day begins at 9 a.m.

The Phase 1 Issues Meeting was held on Wednesday, April 21. This meeting was a round table discussion of the issues raised in the Issues Paper. It was also an opportunity for participants to raise other issues. Some of these 'new' issues are within the scope of the Task Force review of the legislation and are addressed in this Options Paper. Others of these 'new' issues are not within the scope of this review and have been recommended by the Task Force chair for the next review of the *Workers' Compensation Act*.

During the two-day Options Meeting, participants will discuss options presented in this Options Paper, as well as other options that may emerge in submissions in response to this paper.

Scope of the Task Force review:

According to the direction of the Minister responsible for the *Workers' Compensation Act*, the Task Force review of the Act addresses issues in three categories:

1. the claims appeal process;
2. accountability to clients (workers and employers); and
3. the Board/Minister relationship.

Legislation covering issues within the scope of the review will be finalized and tabled in the Legislative Assembly in the fall of 1999.

The task Force review has three phases:

- Phase 1 was an information-gathering opportunity. An Issues Paper, outlining concerns raised by stakeholders, was released for comment. This paper was also the basis of discussion at an Issues Meeting held as part of Phase 1.
- Phase 2 of the review deals with options to address stakeholder concerns.
- Phase 3 is the final part of the Task Force review. At this point, stakeholders will have the opportunity to review proposed legislative changes that come out of the Phase 2 Options. A drafting committee of stakeholders actively involved in the review will be struck, proposed amendments will be delivered to legislative drafters, and the draft legislation will be available to stakeholders for review.

About the Options Paper:

The Options Paper is divided into three categories that align with the original three categories in the Issues Paper:

1. Category 1: the claims appeal process (This category is divided into Part 1 – appeal process steps, and Part 2 – overview issues.);
2. Category 2: Board accountability to clients; and
3. Category 3: Board/Minister relationship.

The issues in the Options Paper have been renumbered from the Issues Paper to integrate new issues identified by stakeholders that fall within the scope of the review. (see pages 4 and 5). Please note that for easier reference, the issues in the Options Paper are numbered consecutively from 1 to 23 so that:

- Issues 1 to 7 are in Category 1 Part 1 — claims appeal process (appeal process steps);
- Issues 8 to 15 are in Category 1 Part 2 — claims appeal process (overview issues);
- Issues 16 to 20 are in Category 2 — board accountability to clients (workers and employers); and
- Issues 21 to 23 are in Category 3 — Board/Minister relationship.

Questions?

Please call:
Task Force office
(867) 667-8336 or
1-800-661-0408 local 8336
(toll free from outside Whitehorse)

mail comments on the Options Paper to:
Laurie Henderson, Task Force Chair,
Workers' Compensation Act review,
Box 2703
Whitehorse, Yukon Y1A 2C6

e-mail comments to the Task Force at:
wca.review@gov.yk.ca

fax comments to:
(867) 393-6438.

The deadline for written comments is
June 17, 1999.

Check out the Task Force website at www.wcbactreview.yukon.net and read the Options Paper there.

You are also invited to attend the Phase 2 Options Meeting. This two-day meeting will be a round table discussion of suggested options presented in this Options Paper.

Phase 2 Options Meeting
Thursday, June 17 and Friday, June 18, 1999
9 a.m. to 4 p.m. each day
High Country Inn (Ballroom) Fourth Avenue in Whitehorse

Options Paper Set-up

Category 1 – claims appeal process (Part 1 — appeal process steps)	
Issue in Options Paper	Issues Paper reference
1. new/revised appeal process	new issue that falls within the scope of this review
2. knowledge of Internal Review Committee members	Category 1, Issue 1
3. conflict of interest (independent appeal panel vs board as appeal panel)	Category 1, Issue 2
4. appeal time lines	Category 1, Issue 3
5. written reasons for decision	Category 1, Issue 7
6. alternate dispute mechanisms (mediation)	Category 1, Issue 9
7. judicial review of appeal panel decisions	new issue that falls within the scope of this review

Category 1 – claims appeal process (Part 2 – overview issues)	
Issue in Options Paper	Issues Paper reference
8. medical reviews	Category 1, Issue 4
9. status of Board staff in appeals	Category 1, Issue 5
10. role of policy in the claims appeal process	Category 1, Issue 6
11. workers' advocate	Category 1, Issue 8
12. 'pay out' of compensation during appeal process/payback of overpayment from administrative error or policy change	new issue that falls within the scope of this review
13. suspension or reduction of compensation in the process	new issue that falls within the scope of this review
14. access to information and protection of privacy (combined with Issue 15)	new issue that falls within the scope of this review
15. accessibility of information	Category 2, Issue 6

Category 2 – board accountability to clients (workers and employers)	
Issue in Options Paper	Issues Paper reference
16. board accountability to the public through the legislative assembly	Category 2, Issue 1
17. Board financial decisions	Category 2, Issue 2
18. annual report	Category 2, Issue 3
19. information meetings	Category 2, Issue 4
20. client service/satisfaction	Category 2, Issue 5

Category 3 – Board/Minister relationship	
Options Paper reference	Issues Paper reference
21. role of the Minister	Category 3, Issue 1
22. appointments to the Board of Directors	Category 3, Issue 2
23. role of the Board of Directors	Category 3, Issue 3

Reading the Options Paper:

Within each category, the options in this paper are presented in sections of information under the headings:

- Comment (anything special about the option);
- Options (numbered for easier reference);
- Your comments (space for your written comments);
- Questions (to help determine the appropriateness or necessity of any or all of the options);
- Considerations (key concerns that underlie the issue);
- What's been said by stakeholders (comments from stakholders' written submissions to the Issues Paper and comments made by stakeholders during the April Issues Meeting);
- Section References in Yukon *Workers' Compensation Act* (what the Act says about the issue); and
- Other Jurisdictions (what legislation in other jurisdictions in Canada says about the issue).

Task Force review of the Yukon Workers' Compensation Act

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Category 1 Issues

Claims Appeal Process
Part 1: appeal process steps (Issues 1 to 7)

Category 1: Claims Appeal Process
Part 1: appeal process steps
Issue 1: Claims Appeal Process

Comment:

This is a new issue that falls within the scope of the review. Raised by stakeholders at the Issues Meeting, it emerged from discussions about conflict of interest (see Issues Paper, Category 1 Issue 2) in the claims appeal process. This issue addresses the basic structure of the claim process, starting with identifying who decides on a claim in the first instance through to the final appeal of a claim.

Options:

These options consider only the overall appeal process (i.e. options for a two or three-tiered process). The appeal panel could be either a panel composed of Board members or an Independent Appeal Panel (discussed under Category 1 Part 1, Issue 3).

1. Status quo — Adjudicator ➔ Internal Review Committee appointed by the board president ➔Appeal Panel
2. Modification of the status quo— Adjudicator ➔ Appeals Officer ➔ Appeal Panel
3. Two-stage process — Adjudicator ➔ Appeal Panel
4. Three-stage process — Adjudicator ➔ Appeal Committee appointed by Cabinet ➔ Appeal Panel

Your comments:

Questions:

- Does the option balance the need for an efficient and timely claims process with the need for impartial decision making at the final appeals stage?
- Does the option give board administration adequate opportunity to review a decision made in the first instance to be sure that board policies have been applied properly before an appeal panel becomes involves in the matter?
- Does the option give injured workers enough time and opportunity to become fully aware of the appeal process and to fully articulate their concerns so as to be able to present their 'best case' to decision-makers?
- Does the option ensure certainty in terms of knowing who will be making decisions on a claim?
- Does the option make it possible to have decision-makers, who are knowledgeable and experienced in making claims decisions, involved in the process?

Considerations:

- Workers and employers must have the utmost confidence that claims issues will be heard fairly and openly by decision-makers.
- The number of claims filed, combined with the inevitably of human error and the fact that new information may arise, suggests that the administration should be given the opportunity to review decisions made in the first instance so that mistakes are not made and policies set by the Board are implemented before the expense and rigour of an appeal panel is incurred.
- The overall process must be cost-effective and efficient.
- Those involved in making decisions on claims must have the requisite knowledge of claims matters and must be appropriately trained to appreciate the complexity of the issues and to respect the personal concerns and frustrations of claimants.

Issue 1: Claims Appeal Process (continued)

What's been said by stakeholders:

- Bias or 'apprehension of bias' (i.e. fear of bias) is the fundamental concern with the present structure.
- Need to reduce tension that could arise between the Board and any independent appeal panel that might be established.
- No one who is paid by the board should be on an appeal panel or work as an adjudicator (these people should work for the Department of Justice).
- Should have two levels of appeal:
  1. the appeal panel
  2. an independent appeal body chosen by the worker to hear the appeal (similar to the Human Rights Commission or Ombudsman etc.). This body should be separate from the Board.
- There are three areas of concern:
  1. Board accountability for policy;
  2. stakeholder/client access to the Board; and
  3. responsibility for the appeal process.

  The question is 'how to balance all three and not create a conflict of interest'.
- Members of the Board should not be involved in the appeals process. An appeal panel should be the second level of appeal. Board members should not sit on the appeal panel – they are in conflict of interest when the appeal is from the staff who report to them.
- To have the Board sit on the appeal panel as well as approve the policies that guide the appeal process, and create the rules about conflict of interest within the appeals process, could create a partisan process that would be discriminatory to claimants and lead to a conflict of interest for the Board.
- As long as the principles of natural justice are adhered to, there need not be a problem with conflict of interest.
- Appeal panel participation is an operations function that should not be a responsibility of the Board. Board member activities should be limited to policy development and management roles. Expanding responsibilities into operational functions calls for a more diverse set of competencies, steepens the learning curve and increases the risk of uninformed decision-making.

Section References in Yukon *Workers' Compensation Act*:

11. A claim for compensation shall be dealt with and determined in the first instance on behalf of the board by a claims adjudicator employed by the board.

17.(1) Upon the written request of a worker, a dependant of a deceased worker or the worker's employer, senior staff designated by the board shall review any decision made concerning a claim for compensation.

18.(1) A worker, a dependant of a deceased worker, or the worker's employer may appeal a decision made under section 17 to the members of the board.

Note: The Act establishes a three-tiered claims process, all involving either staff of the board or the members of the Board

Other Jurisdictions:

- Most jurisdictions have a three-tiered system:
  — some have three bodies to hear a claim (i.e. decision at first instance and two levels of appeal, such as in British Columbia where the three tiers are an officer, a review board and an appeal division)
  — some have three levels, but only two bodies conducting the review (e.g. Manitoba has a board, reconsideration by board, then an appeals commission).
- Some jurisdictions (e.g. Saskatchewan, Manitoba, British Columbia) integrate a medical review panel into the process to 'adjudicate' on medical disputes that may arise. The decisions of this panel, which are restricted to resolving medical disputes, are conclusive and binding on the body that makes decisions about entitlement and related issues.
- Some jurisdictions (e.g. Ontario, Nova Scotia) state in their legislation that decisions in the claims process must be based upon the real merits and justice of the case and be in accordance with the Act, regulations and policies.

Category 1: Claims Appeal Process
Part 1: appeal process steps
Issue 2: Knowledge of Internal Review Committee members
(corresponds to Issues Paper Category 1 Issue 1)

Comment:

If Option 2, 3 or 4 is selected under Issue 1, this issue is no longer relevant.

Options:

1. Status quo — Leave the term 'senior staff' as is.
2. Define the term 'senior staff' in the Act (i.e. who they are in terms of position, skill and experience).
3. Define the term 'senior staff' by providing a set of qualifications in the Act (i.e. selection criteria to determine who 'senior staff' are).

Questions:

- Could the definition of 'senior staff' affect the quality of an Internal Review Committee (IRC) decision or the time that it takes the IRC to make and communicate its decision?
- Are there cost implications (e.g. financial, time management re volume of work, staffing) of your preferred option?
- Would a definition of 'senior staff' give greater flexibility so that more personnel would be available to hear appeals (i.e. a faster process)?
- What is the possibility of inexperienced individuals, or those with inappropriate skill sets, finding themselves on the IRC for the sake of expediency?

Your comments:

Considerations:

- Those involved in making decisions on claims must have the requisite knowledge of claims matters and be appropriately trained to appreciate the complexity of the issues involved and to respect the personal concerns and frustrations of claimants.
- The Act should be clear about its meaning; ambiguity can lead to uncertainty and possible conflict.

What's been said by stakeholders:

- It's essential that IRC members are competent and adhere to the principles of natural justice (e.g. that people be heard, receive reasons for decisions that affect them and have an unbiased hearing).
- The term 'senior staff' is meaningless without imposing qualifying standards, such as being knowledgeable, fully trained and free from any conflict of interest.
- The term 'senior staff' should be clearly defined to help claimants understand the process.
- Leave the term 'senior staff' as is to preserve as much flexibility as possible in administering board responsibilities effectively and efficiently.
- 'Senior staff' have a vested interest in the administration, and may tailor their decisions to that end.
- The IRC should be expanded to include specific expertise when appropriate (e.g. a physician).
- The position of IRC chair and its accountability to the members of the board should be entrenched in the legislation. This is to prevent it from falling under the authority of the president or the Claimant Services Branch since both have daily links with claimants.

Section Reference in Yukon *Workers' Compensation Act*:

17.(1) Upon the written request of a worker, a dependant of a deceased worker, or the worker's employer, senior staff designated by the board, shall review any decision made concerning a claim for compensation.

Note: The Act does not define the term 'senior staff', nor does it provide direction on this matter. Section 17 does not place qualifications on these individuals other than their status as 'senior staff', nor does this section mention an 'internal review committee' although it does provide for an 'internal review process'.

Other Jurisdictions:

- No other jurisdiction uses 'senior staff' or any other similar term in the context of an internal review.

Category 1: Claims Appeal Process
Part 1: appeal process steps

Issue 3: Conflict of interest (Board or Independent Appeal Panel)

(corresponds to Issues Paper Category 1 Issue 2)

Options:

1. Status quo — Appeal panel composed of members of the Board*.
2. Appeal panel with members appointed by Cabinet; completely separate from the Board*.
3. Appeal panel with members appointed by Cabinet with the chair of appeal panel a member of the Board (voting or non-voting member)*.

* *All have equal representation of employers and workers.*

Questions:

- Is the appeal panel sufficiently connected to the Board at the policy level to ensure that the panel can effectively apply the policies developed by the Board?
- Is there clear enough accountability between the Board, the appeal panel and the public?
- Is there sufficient separation between the Board and the appeal panel to ensure that concepts of 'independence' are met and concerns respecting bias or the apprehension of bias are addressed?
- What is the potential increased cost of an independent appeal panel? (*see Appendix 1*)

Your comments:

Considerations:

- Appeal panels must be composed of worker and employer representatives in equal numbers.
- Appeal panels must give reasonable and fair consideration of the policies of the Board and should be bound by these policies and the legislation.
- Appeal panels must apply the existing legislation, rules and policy in a fair and equitable manner.
- Appeal panels must have understanding of the policy as it is being developed to ensure equitable application by the appeal panel.
- Appeal panels must make decisions based on all of the relevant information, including new information that may have been only recently discovered or determined to be important.
- Appeal panels must be active participants in the review, asking questions to ensure that all issues are thoroughly considered.
- Appeal panels must have the capacity to revoke or vary a lower decision and substitute a new decision where appropriate in the circumstances.
- Appeal panels must be able to make final decisions that are not open to question or review by any court, except as permitted by the common law.
- Appeal panels must have some level of financial independence (i.e. financial 'survival' of the appeal panel cannot be tied to the Board).
- Appeal panels must be accountable to the public.

Issue 3: Conflict of interest (continued)

What's been said by stakeholders:

- Other jurisdictions (e.g. British Columbia) and other legislation (e.g. Yukon *Human Rights Act*) have independent hearing boards. The appeals board appointment process could be similar to the process for Board appointments.
- In other jurisdictions where an independent appeal body has been established, there is often an adversarial relationship between the Workers' Compensation Board and the appeal panel...need good communication between the two or administration can play one body against the other.
- Consider an expanded Board of Directors...it may be more practical to enlarge the Board and designate certain Board members as appeal panel members.
- Articulate in legislation an avenue for appeal to court.
- The appeal hearing should be independent of any influence from board administration.
- There should be an independent and separate appeal body appointed by someone other than the Board.
- Not sure if separate body is the way to go – could lead to conflict between administration/appeal panel/Board.
- Those implementing policy should have a clear understanding of policy (i.e. why it's used and what it does).
- Any independent appeal panel should be bound by board policy, but could give policy back to the Board with comments if the panel feels the policy is inappropriate.

Section References in Yukon *Workers' Compensation Act*:

97.(1) Matters required to be determined by the members of the board under paragraph 93(g) [refers to the hearing and determination of decisions under section 17] shall be heard by an appeal panel of the board which shall be established by the chair and shall consist of

(a) the chair or alternate chair, who shall be the presiding officer of the panel,
(b) one member representative of employers, and
(c) one member representative of workers.

Other Jurisdictions:

- About half of the jurisdictions across Canada use an appeal panel that is separate from the Board of Directors.
- Several jurisdictions have appeal panels that are separate from the Board of Directors but that are ultimately accountable to the Board (i.e. the Board may make final decision on appeal or direct the panel to hear the matter again where the Board does not believe that the appeal panel has applied board policy in a fair and reasonable manner).
- Wherever there is an independent appeal panel, the statutes direct that the panel is bound by the policies of the board, as well as the Act and regulations. (*see Category 1 Part 2, Issue 10*)
- In some instances (e.g. Ontario) the appeal panel may refer a policy back to the Board for consideration as to the consistency of the policy with the Act. The Board has the final decision, however, as to whether or not a policy is consistent with the Act and whether it must be applied in the circumstances.
- Two jurisdictions (Nova Scotia, Ontario) affirm that where it is not practicable to decide on an issue because the evidence for and against is equal, the issue must be resolved in favour of the person claiming the benefit.

Category 1: Claims Appeal Process
Part 1: appeal process steps
Issue 4: Time lines

(corresponds to Issues Paper Category 1 Issue 3)

Comment:

Time lines may be applied in two situations:

1. when an appeal is filed by a worker or employer (filing); and
2. when an appeal body provides its decision.

Options:

1. When an appeal is filed by a worker or an employer:
   (a) Do not impose time limits on workers' / employer's right to file an appeal.
   (b) Impose time limits in legislation on workers' / employers' right to file an appeal.
   (c) Build in a discretionary power to extend time limits.

2. When an appeal body provides its decision:
   (a) Do not impose time lines on the appeal process.
   (b) Impose time lines in legislation that govern appeal decisions made by the Board.
   (c) Build in a discretionary power to extend time lines.

Your comments:

Questions:

- Are certainty and closure important?
- Is there a relationship between the quality of the decision and the time line imposed for delivering it?
- Should time lines be absolute or should the legislation allow flexibility where issues are unusually complex or new information arises?
- What is a reasonable amount of time for filing an appeal or making a decision?
- Should extensions be allowed, and if so, what constitutes a reasonable extension (e.g. the need to receive outside relevant medical information)?
- What are the cost implications (e.g. financial, time management re volume of work, staffing availability)?

Considerations:

1. *When an appeal is filed by a worker or an employer:*
   - If time lines are imposed, they should be used to enhance certainty and to bring finality to an issue, while allowing for flexibility where circumstances change (e.g. new evidence or information or substantive change in circumstances).
   - There should be provisions to monitor and adjust time lines once they are imposed to be sure the time lines are realistic and workable.

2. *When an appeal body provides its decision:*
   - If time lines are imposed, they must be sufficient to provide for quality decisions (i.e. time lines should not be so short as to force quick decisions based on limited evidence).
   - There should be provisions to monitor and adjust time lines once they are imposed to be sure the time lines are realistic and workable.
   - The imposition of time lines must be met with appropriate staffing and resource levels.
   - If time lines are imposed, extensions on rendering decisions should be permitted in complex cases or if there are unique issues in the appeal.
   - Time lines should be used to enhance certainty and to bring finality to an issue, allowing for flexibility where the circumstances change.

Issue 4: Time lines (continued)

What's been said by stakeholders:

- Definite time lines should be imposed at each step of the process for all players (e.g. employers, workers and the Board).
- Appeal process definitely needs time lines to guarantee that workers/employers receive a decision in a timely manner (especially since some injured workers have no income during this period).
- No time limits should be imposed for when a decision on an appeal must be made.
- Time lines should be imposed on the Board to prevent abuse but no time lines should be imposed on workers.
- Time lines should be imposed — subject to some exceptions under special circumstances.
- Baseline for setting time limits should be the date that all medical information is received.
- Time lines for every level of appeal should be written into policy rather than legislation.
- Definite time limit to file a claim appeal to bring the matter to a close (although policy could provide for a claim review should a re-injury occur or new medical evidence surface).
- If time lines are imposed it's important to give more resources to the workers' advocate and to appoint Board members on a full-time basis.

Section Reference in Yukon *Workers' Compensation Act*:

- Nothing in the Act provides for time lines that govern the appeal process or limit a worker's right to file an appeal.

Other Jurisdictions:

1. *When an appeal is filed by a worker or an employer:*
   - Few jurisdictions impose time lines on filing an appeal, but where time lines are imposed, most jurisdictions limit the time for filing to a range of 30 to 90 days; Alberta provides for a one-year limit.
   - Jurisdictions that impose time lines on filing an appeal give the power to the final appeal body to extend the time for filing an appeal where there is a material change in the facts or new information becomes available.

2. *When an appeal body provides its decision:*
   - Six jurisdictions have some form of appeal process time lines entrenched in their statutes (British Columbia, Alberta, Ontario, New Brunswick, Nova Scotia, Newfoundland). These jurisdictions provide for justifiable extensions where allowed by the appeal body. Extensions, once given, are final.
   - Three jurisdictions require appeal bodies to make a decision within 60 to 120 days from the date the reconsideration/appeal begins or hearing ends (British Columbia, Ontario, Newfoundland).
   - Nova Scotia provides time lines for postponements and adjournments (e.g. maximum of three to 12 months depending on circumstances — or the day on which the board issues or decides not to issue policy on the particular subject matter).

Category 1: Claims Appeal Process
Part 1: appeal process steps
Issue 5: Written reasons for an appeal decision
(corresponds to Issues Paper Category 1 Issue 7)

Options:

1. Status quo — Reasons on request in legislation supported by board policy on provision of written rules.
2. Legislative direction that written reasons must be provided for all claims decisions, not including procedural decisions.
3. Legislative direction that written reasons must be provided, including reasons that specify the matter being adjudicated, how information considered in the decision-making was evaluated, investigations conducted by the decision-maker, and the application of statutory, policy and discretionary factors.

Questions:

- Would greater understanding of the compensation regime (i.e. awareness of claimant's own case, consistency in decisions between claims) be achieved by the provision of written reasons?
- Should legislation reflect the current practice of the Board?
- Should workers and employers have information presented to them that explains a decision as soon as possible in the process to determine if they want to appeal and to determine the scope and focus of an appeal?
- Should written reasons, noting concerns respecting privacy, be made available to enhance public understanding of the compensation regime and to act as guides for future claimants?

Your comments:

Considerations:

- Written reasons enhance the quality of appeal decisions by forcing decision-makers to identify relevant issues, weigh the evidence and arguments, and state and explain their decisions.
- Written reasons are important to inform the claimant and others of the decision-making process of the Board.
- For decisions to be accepted and respected, they must be understood; written reasons are a tool for making clear decisions and they can also build public confidence in the process.
- Although new information may be presented at an appeal, written reasons from the lower level decision form the basis of most appeals.
- The existing practice of the Board is to issue written reasons for non-procedural decisions, noting that written reasons may vary in form from a letter to a detailed explanation; content is more important than form.

What's been said by stakeholders:

- Written decisions should be required at all stages of an appeal to ensure certainty and clarity for all involved.
- The claimant should receive written decisions.
- Current practice is satisfactory. If a written decision is not requested, it is silly to incur the expense to prepare and deliver the report.

Section References in Yukon *Workers' Compensation Act*:

98.(1) Where a request is made by an employee or a worker, the board shall provide written reasons for any order, ruling or decision that it has made.
(2) In any other case the board may provide written reasons for any order ruling or decision that it has made.

Other Jurisdictions:

- Legislation in other jurisdictions is silent on written reasons. However, the provision of written reasons is integral to administrative justice and fairness and as such, it applies to all workers' compensation systems in other jurisdictions.

Category 1: Claims Appeal Process
Part 1: appeal process steps
Issue 6: Alternate dispute mechanisms
(corresponds to Issues Paper Category 1 Issue 9)

Options:

1. Status quo — Have the legislation remain silent on the possibility of mediation.
2. The legislation would enable the discretionary use of mediation in the appeal process.

Questions:

- Given that the Board already uses mediation in selected cases, is it necessary to put this power in the Act?
- Should the Act note the option of using mediation in the appeal process so that all workers and employers are aware that it may be used?

Considerations:

- Professionally and sensitively conducted informal resolution, led by a skilled mediator, may defuse tensions, prevent a matter from escalating and avoid unnecessary and stressful formal adversarial (appeal) procedures.
- Mediation should be used as a problem-solving tool, not as a way to lessen the entitlement of injured workers.
- Mediated settlements should be ratified by the formal process – either at the first or second level of appeal, with this ratification primarily directed at ensuring conformity with the *Workers' Compensation. Act* vis à vis entitlement.
- Mediation must be a voluntary (i.e. optional) step in the appeal process, considered only when all parties agree to participate.

Your comments:

What's been said by stakeholders:

- Mediation should not be necessary.
- Less formal discussion would allow some quiet speaking, but a manipulative person could swing the decision in the favour of the board.
- Yes to alternate dispute resolution, but this must be hand in hand with attitude training, democratic leadership, cooperation and participation.
- Mediation could work if the parties agree to participate.
- Alternate dispute mechanisms would be worth a try … win/win resolutions are always more desirable and productive…could benefit all parties.
- Too often this becomes a mechanism to pressure workers to accept less than what they are entitled to.
- Legislation should enable the use of alternative dispute mechanisms to resolve claims appeals before or during a formal appeals process.
- Alternate dispute mechanisms would not be appropriate in the claims process… would introduce equity and fairness issues…the purpose of the process is to determine entitlement, not to reach a settlement.
- The present system is adversarial and intimidating.

Section References in Yukon *Workers' Compensation Act*:

- The present *Workers' Compensation Act* does not address mediation, but staff and the Board of Directors indicate that mediation is used in some situations.

Other Jurisdictions:

- Few jurisdictions include mediation as an option within the appeal process but several (e.g. Nova Scotia and British Columbia) use it to help resolve selected cases.
- Ontario gives its Board the power to provide mediation services when it considers that mediation is appropriate.

Category 1: Claims Appeal Process
Part 1: appeal process steps
Issue 7: Judicial review of Appeal Panel decisions

Comment:

This is a new issue that falls within the scope of the review. Raised by participants at the Issues Meeting, it emerged from discussions about the appeal process overall and the interest of some stakeholders to challenge Board decisions in a court of law.

Options:

1. Status quo — No change to legislation given that a matter can already be taken to court if the Board's actions are patently unreasonable or if it made an error in jurisdiction.
2. Explicitly note in the legislation the ability of a court to intervene on matters of jurisdiction.

Questions:

- Are there any good, justifiable reasons for including a provision in the Act when the ability to take legal action already exists in law when errors in law have been made by the decision makers?

Your comments:

Considerations:

- Privative clauses (i.e. no review by court of a decision) are normally included in legislation for administrative tribunals to encourage judicial deference to the decisions a tribunal makes within its sphere of expertise.
- A court has the right to review a decision of an appeal tribunal if the tribunal has exceeded its jurisdiction or where the decision is 'patently unreasonable', even if a privative clause is in the legislation (note: standard of review of a tribunal's decision in relation to issues flowing from the Charter of Rights and Freedoms is 'correctness' rather than 'patent unreasonableness'.
- Judicial review is a review, it is not intended to be another level of appeal and in most instances the review, if an error in jurisdiction is found, will be referred back to the body that made the decision.
- Meredith Principles confirm that the Board, rather than the court, should make final decisions on claims.

What's been said by stakeholders:

- Why spend money on a lawyer for a judicial review only to have the court agree the decision was incorrect and send it back to the Board to reconsider? It amounts to being recycled through the system at great expense.
- Appeals should be taken to the Board first, then to an independent appeal level and finally to court. A judicial review shouldn't say there is a issue and then send it back to the Board. The court should decide the issue.

Section References in Yukon *Workers' Compensation Act*:

96.(3) The acts or decisions of the board on any matter within its jurisdiction are final and conclusive and not open to question or review in any court.

Other Jurisdictions:

- In most jurisdictions where the Board is the final decision-maker on an appeal, decisions are not open to review by a court (Northwest Territories, British Columbia). If an independent appeal panel is the final decision-maker, decisions are not open to review by a court (e.g. Ontario).
- Two jurisdictions address specifically judicial review. New Brunswick identifies in legislation that decisions of the appeal panel can be appealed on matters of jurisdiction or questions of law. Nova Scotia states that a final order of a hearing officer may be appealed to court on the basis that policy applied is not consistent with the Act (issue of jurisdiction).
- All jurisdictions, have a right of appeal where the issue is one of the Board exceeding its jurisdiction.

Task Force review of the Yukon Workers' Compensation Act

Phase 2
— Options Paper —

Category 1 Issues

Claims Appeal Process
Part 2: overview issues (Issues 8 to 15)

Category 1: Claims Appeal Process
Part 2: overview issues
Issue 8: Medical reviews
(corresponds to Issues Paper Category 1 Issue 4)

Comment:

The term 'appeal panel' in the context of this issue refers to either the existing appeal process or an independent appeal panel should one be created in legislation.

Options:

Board medical consultant

1. Status quo — Found only in board policy; provides such things as opinions on compensation medical issues, medical report reviews and interpretations, disabled workers' examinations, and comments on medical treatment options for workers.
2. Define the role of the board medical consultant in the Act in terms of responsibilities, relationship to attending physician, medical examinations, and clarify the scope of the role in the assessment process.

Your comments:

Conflict between medical consultant and worker's doctor

1. Status quo — According to board policy, an adjudicator, Internal Review Committee or a Board appeal panel may call for a medical examination or evaluation under section 14. Only the panel may call for an independent medical examination under section 16 to resolve a medical dispute. The panel may require a certificate that is conclusive, or it may weigh the result as new information in further deliberations (by the appeal panel or by an adjudicator).
2. Entrench the status quo in the Act considering the worker's role in selecting an appropriate medical practitioner.
3. Set out the role and responsibility of an independent medical practitioner in providing a third party analysis of the medical issue. Address the role of the worker in selecting the doctor, the requirement for a timely response and note that this doctor's opinion is binding on the appeal body as far as the medical issue is concerned.

General

1. Provide in legislation that when a specialist and a general practitioner offer medical opinions that differ from each other on the same medical issue, the relative expertise of each practitioner should be considered in weighing the evidence.
2. Provide in legislation that if medical opinions conflict and are not resolved by a conclusive independent medical examination, then decisions on the medical status of the worker should be resolved in favour of the worker.
3. Give workers the right to receive necessary alternative treatment for work-related injuries from a health care professional of their choice.

Questions:

- Should the determination of medical issues be binding on decision makers deciding the appeal?
- Should independent medical opinions come from a panel of doctors or from a single doctor, selected from a roster?
- Should the appeal body provide statements of non-medical facts to an independent medical practitioner to ensure the separation of medical issues from questions of non-medical fact, law and policy?
- Should workers and employers be involved in the process to name the board's medical consultant?
- Should the Act address the question of health care when the care is conducted under the supervision of someone other than a physician (such as a chiropractor, naturopath)?

Issue 8: Medical reviews (continued)

Considerations:

- Given the ambiguity of the terms 'medical practitioner' and 'medical examination' in the Act, the board's attempt to clarify the role of the 'medical consultant' in its policy should be supported in legislation.
- The role of the medical consultant includes educational, advisory and policy development components on medical issues.
- Medical opinions submitted by a physician to the board must never mix medical issues with other questions.
- Medical opinions must be given only after examining the worker and all conclusions must be supported by written reasons that are available to the worker.
- If medical opinions conflict, decisions about the medical condition of workers should be resolved in their favour, after considering the backgrounds and expertise of the physicians involved (i.e. general practitioner or specialist), and other relevant information,
- Workers should have the primary role in determining what doctor they see and are examined by.

What's been said by stakeholders:

- A medical practitioner in section 12 should be defined as the attending physician.
- There should be no legal obligation on the attending physician to file a report to the board; at minimum, there should be a legal obligation on the attending physician to inform the patient before the medical examination that it will result in a report to the board.
- Impose time limits on section 12(1)(c) re progress reports.
- Consult reports should only become the property of the board if it pays for the consult.
- The board interprets 'a medical examination' in section 14(1) to be an exam by the board's medical consultant. This makes the medical consultant the final arbiter in determining a worker's eligibility for a claim even though the consultant may not be a specialist in that area.
- The board's medical consultant often makes adjudicative decisions, determining if an injury is work-related.
- The conclusive independent medical examination set out in section 16 effectively eliminates the worker's right of appeal by way of a second opinion.
- The board's medical consultant is the territory's only allergy specialist. This makes it impossible for workers to get a second opinion on allergies in the Yukon.
- Workers have no say as to the choice of an independent doctor in section 16. Injured workers must be free to

choose their physician for an independent medical exam or, there must be mutual agreement on who will conduct the examination.

- Strengthen subsection 16(2) on independent medical examinations.
- The board already has the authority to determine eligibility, so delete subsections 16(3) that requires workers to submit to an independent medical examination, and 16(4) that requires employers who request that a worker take an independent medical examination, to pay the cost of the examination.
- The board medical consultant is employed by the board and is the final arbiter. This raises questions of bias.
- The board medical consultant should not be able to contradict family physicians or specialists.
- Set up an independent panel of medical consultants.
- The worker is consulted in the decision as to who will conduct the independent medical examination but the final decision remains and must remain with the board.
- The independent medical consultant's report is conclusive and the board (without sound reasons to justify a departure) is bound by that report.
- It's not acceptable for workers or employers to decide if an independent medical examination will be conducted.
- Evaluate the cost effectiveness of the present process.
- The board is not qualified to determine the necessity, character and sufficiency of medical aid required by the injured worker. This determination should be left to the injured worker's physician.

Section Reference in Yukon *Workers' Compensation Act*:

The term 'medical consultant,' as it appears in the Board policy and procedures manual, is not mentioned in the Act. The term 'medical practitioner' is defined in the Act but references to it are ambiguous (e.g. 'worker's attending medical practitioner' and 'independent medical practitioner'). References to 'medical examination' and 'independent medical examination' are also ambiguous. It may be unclear, therefore, as to how these terms relate to each other.

Medical Reports

12.(1) A medical practitioner who attends a worker who has or may have suffered a work-related disability shall

(a) provide reasonable information and advice free of charge to the worker about filing a claim for compensation,

(b) send a report to the board within two days after the first attendance on the worker,

(c) send progress reports to the board as the medical

practitioner considers appropriate, or as the board requires from time to time, and

(d) report to the board when the worker, in the medical practitioner's opinion, is able to return to work.

(2) All reports submitted by medical practitioners to the board are the property of the board.

(3) Payment by the board to a medical practitioner is not in itself evidence that a claim has been accepted.

Required medical examination or evaluation

14.(1) The board may require a worker who may have suffered a work-related disability to submit to a medical examination or other evaluation.

(2) The board may suspend compensation payable to a worker who refuses to comply with the medical examination or other evaluation under subsection (1) until the requirements of the board are met.

Notice of decision and progress report

15.(1) The board shall notify the worker or the dependants of a deceased worker and the worker's employer of any decision concerning entitlement to compensation as soon as practicable.

(2) The board shall provide the employer with a written report concerning a workers' disability if requested in writing by the employer or the worker.

Independent medical examination

16.(1) The board may require a worker to submit to an independent medical examination concerning any matter that may affect the worker's entitlement to compensation.

(2) Before requiring an independent medical examination, the board shall

(a) consult with the worker and the worker's attending medical practitioner,

(b) appoint an independent medical practitioner, and

(c) notify the worker and the employer of the medical practitioner appointed to conduct the medical examination.

(3) The board may require the worker to submit to an independent medical examination under subsection (1) if requested in writing by the workers' employer.

(4) Where an employer has requested an independent medical examination under subsection (3), the cost of the examination, including any reasonable expenses of the worker, shall be paid by the employer and if the employer fails to pay these expenses the board may enforce payment in the same manner as an assessment under this Act.

(5) A medical practitioner appointed by the board under subsection (2) shall examine the worker and certify to the board

(a) the condition of the worker,
(b) the worker's fitness for employment,
(c) if unfit for employment, the reason why,
(d) the extent of the worker's disability, and
(e) any other matters requested by the board.

(6) A certificate provided to the board by a medical practitioner under this section is conclusive of the matters certified therein, unless the board otherwise directs.

(7) The board may suspend compensation payable to a worker who refuses to comply with the medical examination under this section until the requirements of the board are met.

Medical aid

28.(1) The board may provide a worker with any medical aid, including services, devices, or equipment, necessary to grant relief from a work-related disability.

(2) All questions as to the necessity, character and sufficiency of any medical aid shall be determined solely by the board.

Other Jurisdictions:

- Four jurisdictions (British Columbia, Manitoba, Ontario, Quebec) allow workers to select a doctor for a medical examination but if the board considers the choice to be inappropriate the worker may be sent to another doctor, or told that it will not pay for treatment.
- All jurisdictions may require workers to have a medical exam (or investigation) by a doctor selected by the board.
- Employers in five jurisdictions (Northwest Territories, Alberta, Ontario, Quebec, Nova Scotia) may request that the board require workers to have a medical exam. In three jurisdictions (Ontario, Quebec, Nova Scotia), the employer can select the physician.
- All jurisdictions provide for some type of medical appeal or further opinion other than that of the attending physician or board medical consultant.
- Five jurisdictions (British Columbia, Saskatchewan, Manitoba, Nova Scotia, Prince Edward Island) prefer that a panel rather than a single doctor review the medical findings and state panel selection criteria.
- Medical reviewers are chosen by boards, ministers or cabinets but some jurisdictions provide for worker and employer input. Six jurisdictions (British Columbia, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland) set criteria for the preparation of lists of practitioners.

Category 1: Claims Appeal Process
Part 2: overview issues

Issue 9: Status of board staff at appeals

(corresponds to Issues Paper Category 1 Issue 5)

Options:

1. Status quo – The issue of standing is addressed by policy and procedure of the board.
2. Amend legislation to prohibit standing of board staff at appeals.
3. Amend legislation to permit standing of board staff at appeals.
4. Administration (board) has standing.

Questions:

- What is the interest or role of the administration at a hearing?
- Should written reasons for decisions provide explanation and rationale for decisions?
- Will there be an element of confusion or conflict of interest if the Board can provide direction to the administration, on the one hand, and then allow board staff to make a presentation before Board members at a Level 2 appeal?
- Should administrative decision-makers be permitted to appear at appeal hearings to provide factual information on a point of clarification or to defend their original decision?
- Should the board be given standing in the legislation if an independent appeal panel is part of the appeal process?

Your comments:

Considerations:	• Board staff do not have a legal interest to be served. They should not have a vested interest in the outcome of an appeal beyond ensuring that the Act and policies are applied and implemented.. • Written reasons should clearly substantiate and explain lower level decisions.
What's been said by stakeholders:	• Injured workers and employers should be allowed to have a representative (lawyer, doctor, therapist, union official, advisor, family/friend, etc.) at Level 2 appeals since the board can have legal counsel (paid from board funds). • No board staff (including the administration's lawyer) at Level 2 appeals (unless subpoenaed by a claimant). • Board standing at Level 2 appeals creates an interest to defend a decision already made at the adjudication and IRC stages. • Board staff must have standing at Level 2 appeals if an independent appeal process is established. • May be beneficial to grant standing to board staff in some situations but this should be determined on a case-by-case basis, with informed consent of appellant. • Standing for board staff only if they provide additional service or expertise to the process.
Section Reference in Yukon *Workers' Compensation Act*:	• Nothing in the Act provides standing for board staff at appeals.
Other Jurisdictions:	• In most jurisdictions appeal bodies may establish their own practices and procedures. • One jurisdiction (Newfoundland) provides its commission (board) with standing on a matter being reviewed by a review officer and at further proceedings arising out of that matter.

Category 1: Claims Appeal Process
Part 2: overview issues

Issue 10: Role of policy in the appeals process

(corresponds to Issues Paper Category 1 Issue 6)

Options:

1. All policies should be open for public comment before adoption by the board*.
2. Policies should be available to stakeholder groups, through standing committees (such as employer and worker advisory groups, an ad hoc group, or a designated policy committee), before adoption by the Board*.
3. Make certain types of policy subject to mandatory public review and provide flexibility on the need for public consultation for other policy matters*.
4. No public review.*

** all policies should continue to be publicly available.*

Questions:

- Does the public have the time, interest, and energy to participate effectively in policy reviews?
- Would the requirement for public review make revisions and amendments to policies so unmanageable that policies would rarely be revised and updated?
- Are stakeholder groups, representing employers and workers, informed and committed to the appeal process sufficiently to accept responsibility for reviewing draft policies?

Your comments:

Considerations:

- Policy must be applied (i.e. given reasonable and fair consideration) by those making decisions.
- Policy should be drafted to establish non-binding guidelines that should be applied where discretion exists.
- Policy must be consistent with the specifics of the legislation as well as the spirit and intent of the legislation.
- Stakeholders must be part of policy review, but the extent of the review depends on the type of policy.
- Policies must be available to the people affected by them.

What's been said by stakeholders:

- Policies are already in the public domain.
- Perhaps the Department of Justice should set policies.
- Policy should be subject to public scrutiny and an independent policy analyst before being implemented.
- Public should have a say on policies that identify compensable occupational diseases and disabilities.
- Monthly board meetings should be open to the public.
- The policy unit could report directly to the Board of Directors.
- Policy review could be part of a broader periodic board evaluation (operational audit) and tied to legislation.
- Employer and employee members of the Board of Directors should consult their constituents.
- The issue of payment to workers to travel to appeal hearings and to require employers to give workers time off to attend hearings should be entrenched in legislation.
- Policy development and evaluation should be a function of the Board and Advisory Committees.
- Administration should be able to change policy without input of stakeholders, the Board, or legislature.

Section References in Yukon *Workers' Compensation Act*:

93. The members of the board shall
(h) make publicly available all policies of the board relating to claim procedures, assessment procedures and occupational health and safety;

Other Jurisdictions:

- Two jurisdictions (Nova Scotia and Saskatchewan) establish in legislation that policy directives must be available to the public. One jurisdiction (Nova Scotia) enables the Board to invite submissions from interested parties before adopting policy.
- In all jurisdictions the board retains the authority to develop policy for adjudicating compensation claims.
- In three jurisdictions (British Columbia, Ontario, Nova Scotia), claims decisions must be based on the merits and justice of the case based on the Act, regulations and policies.

Category 1: Claims Appeal Process
Part 2: overview issues

Issue 11: Workers' advocate

(corresponds to Issues Paper Category 1 Issue 8)

Options:

1. Status quo — Do not entrench an office of the workers' advocate in the Act.
2. Entrench an office of the workers' advocate in the Act — specifically setting out the mandate, qualifications and appointment, duties, accountability, budget, access to claims information, discretion re rights of workers, and operational policy-making ability. (*see Appendix 2*)
3. Entrench an office of the employer's advocate in the Act.
4. Do not entrench an office of the employers' advocate in the Act but mandate the workers' advocate to provide procedural and educational assistance to employers.

Your comments:

Questions:

- Can the office of the workers' advocate help to ensure fairness in, and accessibility to, the process?
- What duties and responsibilities should fall to the office of the workers' advocate and to whom should it be accountable (i.e. administrative overseer)?
- Considering the information in Appendix 2, what duties and responsibilities should fall to the office of the workers' advocate and to whom should it be accountable (i.e. administrative overseer)?
- What are the cost implications of making the workers' advocate officer permanent?
- Should an employers' advocate be included in the legislation – what is 'need' relative to 'cost'?
- Should the workers' advocate assist employers?

Considerations:

- Workers' advocate (i.e. mandate, appointment, budget, operations, etc.) must be independent and geographically separate from the board.
- The workers' advocate should have the discretion not to assist a worker under certain circumstances.
- Must be able to access, examine and copy all related claim information in the control or possession of the board with the consent of the worker.
- Must have an adequate annual budget set outside of the board (e.g. by the Department of Justice).
- Board must annually budget for the office of the workers' advocate.
- Should be able to participate at all levels of decision making in a claim.
- Should assist workers in appeals, as well as other worker-related issues. (*see Appendix 2*)
- Should an employers' advocate be established in legislation to assist employers with the compensation system as it relates to them?
- Can a workers' and an employers' advocate position be combined in one office?

Issue 11: Workers' advocate (continued)

What's been said by stakeholders:

- Should be entrenched in Act.
- Mandate, scope, and responsibilities need clarification; board needs to buy into them.
- Mandate should:
  (i) protect injured workers' rights;
  (ii) provide access to independent legal counsel;
  (iii) fund groups that help (injured) workers;
  (iv) grant power to initiate court challenges (e.g. involving Charter questions); and
  (v) protect injured workers' 'charter of rights'.
- Purpose should include improved program access, education and support for injured workers; should not be a board watchdog.
- Board and administration should have no input in developing the office of the workers' advocate (i.e. its mandate, budget, reporting relationship, etc.).
- Should only assist workers — not employers.
- Reporting mechanism needs to be clearly stated to ensure independence of workers' advocate from board (e.g. could report to the legislature).
- Budget should be set annually by the legislature.
- Present workers' advocate overworked and under-resourced.
- Not enough known about the local position to judge its effectiveness.
- 'Relevancy' of position needs to be determined by Department of Justice.
- Needs a lawyer to advise on complex legal areas and oversee the process.
- Establishing an employers' advocate would result in balanced hearings since many small employers do not have the expertise to represent themselves.
- Establish a joint workers'/employers' advocate office.
- The board should pay for the advocates' office.
- The advocates' office should be located in the Department of Justice.

Section Reference in Yukon *Workers' Compensation Act:*	• Nothing in the Act provides for a workers' advocate office.
Other Jurisdictions:	• Four jurisdictions (Saskatchewan, Manitoba, Nova Scotia, Prince Edward Island) provide for workers' advisors in their legislation. • Like the Yukon, the Northwest Territories has non-statutory workers' advocate offices. • Alberta has internal appeal advisors (within its board) who assist workers (not specifically referred to in its Act). • Newfoundland has a workers' advisor who operates independently of its commission under the auspices of the Federation of Labour. It also has an employers' advisor. • Three jurisdictions (British Columbia, Ontario, New Brunswick) have workers' and employers' advisors. • Either Cabinet or Minister appoints worker/employer advisors. • Most jurisdictions set out the duties or function of the advisors in legislation. • In four jurisdictions (British Columbia, Ontario, New Brunswick, Nova Scotia) adviser budgets are set by Cabinet or Minister, usually paid by government and reimbursed by the board or commission. • In Prince Edward Island, the board sets the annual workers' advisor budget. • British Columbia and Manitoba do not require its advisors to be lawyers. • Nova Scotia requires its chief workers' advisor to be a lawyer and to submit an annual report (containing financial and operational information) to the Minister.

Category 1: Claims Appeal Process
Part 2: overview issues
Issue 12: 'Pay out' of compensation/'pay back of overpayment'

Comment:

This is a new issue that falls within the scope of the review. It emerged during stakeholder discussions about financial accountability of the board administration.

Options:

A. Withholding of Payments re Appeal

1. Status quo — The board indicates that it does pay compensation pending the outcome of an appeal.
2. Entrench the practice of paying compensation pending the outcome of an appeal in the Act with consideration given to whether or not the worker should have to repay amounts incorrectly paid, as determined by the final appeal.

B. Interest

1. Status quo — No interest paid on retroactive compensation.
2. Require the board to pay interest on cc.npensation payable to a worker or the workers' dependants where the initial adjudication of that claim or the appeal decision is delayed a certain number of days (e.g. 60 days), if the delay arises out of circumstances that are within or ought to have been within the control of the board.

Your comments:

C. Overpayment

1. Status quo — Payments to which the claimant is not entitled may be recovered in whole or part by the board.
2. Do not attempt to recover overpayments the claimant is not entitled to, unless there is evidence of fraud or misrepresentation on the part of the claimant.

Questions:

A. Withholding of Payments re Appeal

- Should the board automatically suspend payment to the worker after it receives an appeal request?
- Should the worker be able to keep money paid to him or her during the appeal process even if at the final appeal it is determined that payment is not appropriate?
- Is it fair that the worker be required to go without compensation payments while an appeal is pending?
- Setting aside fraud or misrepresentation, does the non-recovery of compensation incorrectly paid to a worker outweigh the continuation of income for those who are disabled as the result of work-related injury or disease?

B. Interest

- If you believe that interest should be paid to a worker, should the board take responsibility for delays that are within the capacity of the board to correct and pay interest accordingly?
- If you believe that interest should be paid to a worker, what is a reasonable delay period before interest should be paid?
- What interest rate should be used if interest is to be paid (e.g. Bank of Canada rate)?

C. Overpayment

- Should the board collect overpayments that are due to clerical or administrative errors?
- Are there instances when overpayments should not be collected such as when:
  (a) the overpayment results from an appeal decision? (i.e. worker is paid benefits not allowed on appeal);
  (b) all or part of the overpayment occurred three years or more before the board notices it?
  (c) workers have relied on compensation as a main source of income but the board later finds they were not entitled to the benefits and the workers in the meantime missed their chance for benefits from other income replacement sources (e.g. employment insurance, Canada Pension Plan disability benefits, group insurance or persona insurance plans?

Issue 12: 'Pay out'/'pay back' (continued)

Considerations:

- If payments are made before the appeal process is over, there is a risk that workers will receive more funds than they are entitled to under the *Workers' Compensation Act*.
- If payments are not made before the appeal process is over, will the worker be forced to rely on social assistance or other government income support programs?
- If interest is paid, interest for delays arising out of circumstances under the control of the board would start to accrue on a reasonable date into the delay but should not be retroactive to the first day of the claim.
- If interest is paid, it should affect only those claims that are filed subsequent to the legislation (i.e. no retroactivity).

What's been said by stakeholders:

- If a worker wins at the Internal Review Committee but the employer appeals, the worker should not have to wait for compensation benefits until the appeal is finished.
- The Act should require interest be paid on retroactive benefits.
- Overpayment of compensation due to administrative errors or policy changes and subsequent recovery under section 89(a) creates a serious financial problem for an injured worker (e.g. the board goes back years, changes your rate of compensation and expects you to pay all the money back).

Section Reference in Yukon *Workers' Compensation Act*:

The Act does not provide for interest to be paid on retroactive compensation benefits, nor does it speak to the payment or suspension of compensation benefits pending the outcome of an appeal initiated by an employer.

89. Where the board pays compensation to which a person is not entitled, such amount may be recovered from the person by the board in whole or in part by way of
(a) a debt due to it by that person,
(b) set-off against any compensation payable to that person.

Other Jurisdictions:

- Ontario must continue to pay to a worker any periodic payments required by a decision under appeal pending the outcome of the appeal.
- Two jurisdictions (Quebec and Newfoundland) pay interest when a decision is delayed. Newfoundland pays interest from 30 days after the claim for compensation was received if the board is responsible for any delays. Quebec pays interest to the worker from the date of the claim.
- British Columbia pays interest on a compensation award granted to a worker by an appeal decision but not with respect to delays in rendering decisions.
- Most jurisdictions have the power to recover an overpayment of compensation to a worker by characterising it as a debt due to the board.

Category 1: Claims Appeal Process
Part 2: overview issues
Issue 13: Suspension or reduction of compensation in the process

Comment:

This is a new issue that falls within the scope of the review. This issue emerged during discussions about the role of the board's medical consultant in interpreting medical reports written by the doctor who examined the worker.

Options:

1. Status quo — No change to section 7.
2. Add a 'reasonableness' test to the section so that, for example, the board can only suspend or reduce compensation if the worker unreasonably refuses to submit to treatment or takes part in an activity that imperils or delays recovery.
3. Amend section 7(c) so that a suspension or reduction of compensation may occur if the worker fails to notify the board of a change of doctor (and provide reasons for the change).
4. Allow the board be able to terminate benefits in any of the scenarios described in section 7 of the Act.

Questions:

- If the Board believes that a worker's behaviour is not reasonably justified in the circumstances, should the legislation require the Board to set out its reasons in a decision letter that can be appealed separately?
- What is the appeal mechanism available to the worker in this circumstance?

Your comments:

Considerations:

- The decision to suspend or reduce compensation must depend on criteria that balances the worker's rights and needs respecting self-determination and freedom of choice, and the board's need to ensure that the granting of compensation rests on a sound medical diagnosis.

What's been said by stakeholders:

It's not fair that injured workers:

- can be cut off benefits because they can't go to a particular rehab program (e.g. Power Program) because they fear re-injury. *(about section 7(a))*
- don't have the right to choose what treatment is best for them What makes the board the expert? *(about section 7(a))*
- can be cut off benefits if they have a good day and can shovel the walk or cut the grass or if they go for a walk and slip and fall. *(about section 7(b))*
- can be cut off benefits because the board doctor or a family doctor refers them to another doctor they don't like. *(about section 7(c))*
- don't have the right to get a second opinion from a doctor of their choice. *(about section 7(c))*

Section Reference in Yukon *Workers' Compensation Act*:

7. The board may suspend or reduce compensation payable to or in respect of a worker, if the worker

(a) refuses to submit to treatment or rehabilitation the board considers essential to the worker's recovery or rehabilitation,

(b) takes part in any activity that imperils or delays recovery from the disability, or

(c) changes medical practitioners without a referral from the previous medical practitioner or without the permission of the board.

Other Jurisdictions:

- All jurisdictions except Saskatchewan and Ontario can reduce or suspend compensation if workers persist in practices likely to imperil or retard recovery, or refuse a medical/surgical aid that the board, based on independent medical expertise, considers reasonably necessary.
- Two jurisdictions (Nova Scotia, Newfoundland) have the power to terminate compensation under those conditions.
- Manitoba can terminate, decrease or increase compensation as the result of a review of a periodic payment to a worker.

Category 1: Claims Appeal Process
Part 2: overview issues

Issue 14: Access to information and protection of privacy
Issue 15: Accessibility of information

(Corresponds to Issues Paper Category 2 Issue 6)

Comment:

Issue 14 (a new issue within the scope of the review) and Issue 15 (reference the Issues Paper Category 2 Issue 6), are grouped together for the purposes of the Options Paper given the overlapping nature of the two.

Options:

1. Status quo — No changes to the Act.
2. Amend the *Workers' Compensation Act* to mimic the *Access to Information and Protection of Privacy Act* (ATIPP) with respect to time lines and other procedures to ensure consistency between the two statutes.
3. Amend the the *Workers' Compensation Act* to require the board to establish a public register, accessible to the public during business hours, that contains all policies, rules and procedures of the board.
4. Establish policies and rules to detail the board's record keeping practices on claims files to:
   - document all information the board has respecting a worker that may be used by an adjudicator and other decision makers in the appeal process; and
   - detail how the ATIPP Act will be applied in relation to requests for information to ensure that disclosure of information to a claimant is not unduly or inappropriately restricted.

Your comments:

Questions:

- Is there a need for consistency between the ATIPP Act and the *Workers' Compensation Act* in terms of the ability to access information or should the two systems continue to be separate, knowing that the ATIPP Act is ultimately paramount?
- Are stakeholders experiencing a problem in obtaining information because it is not readily apparent where to go to find the information, because there is a difference between the ATIPP Act and the *Workers' Compensation Act*, or because they believe provisions of either or both statutes are interpreted too restrictively?
- Are legislated changes required to meet concerns about accessibility to information?
- Should the board be required to provide any number of copies of documents to people who request them (and to whom such documents can properly be given)?
- Would a centralized public register assist you in obtaining information about board policies, rules and procedures?

Considerations:

- Accessibility of information needs to be considered in terms of balancing the need for information to ensure that good decisions are made in the appeals process with an overarching need to protect personal privacy.
- The *Workers' Compensation Act* provisions respecting access to information apply to workers and employers who request information directly from the board.
- The ATIPP Act applies to the Workers' Compensation, Health and Safety Board and its records. (*see section 4.(1) ATIPP Act*) The ATIPP Act sets the standards and conditions for accessing information and protecting personal privacy; it is paramount to the provisions established in the *Workers' Compensation Act*, but an application must be made through the ATIPP Act to be sure that the standards and procedures of the ATIPP Act are applied.
- In making information available to people, the board must balance the need to provide an endless number of copies of a document with a person's need to have enough information to understand and participate in an appeal.
- Although not a legislated requirement, the board has a policy of providing the first copy of file information free to workers and employers, but generally charges for subsequent copies of documents.

Issue 14: Access to information and protection of privacy
Issue 15: Accessibility of information (continued)

What's been said by stakeholders:

Re Access to Information and Protection of Privacy

- The board 'owns' medical reports. If the board gets a copy of the medical report without the patient/worker knowing this, the board should have to return the report and delete any copy from its files.
- Concern about wide scope and power of the board to access medical information. Its access should be limited to 'relevant' information.
- The board can inappropriately use the information it gets.
- Information about workers should be divulged according to the *Access to Information and Protection of Privacy Act*. The board interprets the ATIPP Act to give people as little information as possible.

Re accessibility of information

- Clients should be able to access relevant information (e.g. policies, personal information and legal opinions).
- Section 79(1), dealing with confidentiality, should be revoked. The board uses this section to cover up mistakes made by past administrations.
- Clients should not be charged for information.
- Clients need more information about board policy development.
- Policies and other board information should be provided free to clients...even if it is on the internet (lots of people do not have the internet).
- Board policies should be easy to read.
- Board policies are readily available. Board directives and legal opinions on the interpretation of policies are not available. Without these, stakeholders cannot articulate an informed position on policies.
- The legislation should state that the board must develop policies to guide its decisions. Policy itself should not be legislated.
- The board should consult with stakeholders on key issues and inform them of policy changes but it should be required to seek input on every policy it develops.
- Reasonable requests for copies of policies, reports and other material should be provided without charge.

Section Reference in Yukon *Workers' Compensation Act*:

Re Access to Information and Protection of Privacy

12.(2) All reports submitted by medical practitioners to the board are the property of the board.

19.(1) A worker, or the dependant of a deceased worker, may, at the offices of the board, examine and copy all information in the possession of the board in respect of their claim but shall not use the information otherwise than for the purpose of procedures before the board unless permitted by the board.

(2) An employer who is a party to a review under section 17 or an appeal under section 18 may, on request to the board, examine and copy any information in the board's possession that the board considers relevant to an issue at the review or the appeal but shall not use the information for any purpose other than for a review under section 17 or under section 18.

(3) Where an employer has made a request under subsection (2) the board shall immediately notify the worker or the dependants of a deceased worker of the information the board considers relevant and permit written objections to be made within a period of time determined by the board and release the information that has not been objected to by the worker.

79.(1) No member of the board, employee or agent of the board or person authorized to make an examination or inquiry under this Act shall divulge or allow to be divulged, except in the performance of their duties or under authority of the board, any information obtained in the administration of this Act.

(2) Despite subsection (1), a person authorized by the president may divulge information respecting the business of an employer or a claim of a worker to officials of other governments or other workers' compensation boards.

(3) Whenever information in respect of a specific claim, other than information that is statistical in nature, is provided to another government under subsection (2), the board shall notify the worker or the employer of the information that has been provided.

Issue 14: Access to information and protection of privacy
Issue 15: Accessibility of information (continued)

Section Reference in Yukon *Workers' Compensation Act*: (continued)

Re accessibility of information

19.(1) A worker, or the dependant of a deceased worker, may, at the offices of the board, examine and copy all information in the possession of the board in respect of their claim but shall not use the information otherwise than for the purpose of procedures before the board unless permitted by the board.

(2) An employer who is a party to a review under section 17 or an appeal under section 18 may, on request to the board, examine and copy any information in the board's possession that the board considers relevant to an issue at the review or the appeal but shall not use the information for any purpose other than for a review under section 17 or an appeal under section 18.

(6) Where a worker, or a dependant of a deceased worker, or an employer is entitled to information under this section, their agent shall have the same access.

(7) The board may fix a fee for providing copies of documents under this section.

Other Jurisdictions:

- Most jurisdictions have legislation that addresses access to information and protection of privacy.
- Many jurisdictions charge for copies of some information, but have policies that the first copy of a document is free.

Task Force review of the Yukon Workers' Compensation Act

Phase 2

— Options Paper —

Category 2 Issues

Board Accountability to Clients
(workers and employers)

Category 2: Board accountability to clients

Issue 16: Board accountability to the public through the Legislative Assembly

(corresponds to Issues Paper Category 2 Issue 1)

Options:

1. The Board chair and president should appear before the Legislative Assembly or an all party committee once a year.
2. There should be a requirement in the Act that the board produce a Five-year Strategic Plan as well as an Annual Operational Plan that reflects the goals and objectives of the Five-year Strategic Plan.
3. There should be a requirement for an operational audit (paid for out of the compensation fund) to be held every three years. This audit should be undertaken by an independent body and should be provided to the public upon tabling with the Minister.

   The operational audit has both an administrative and financial aspect. The administrative aspect of the operational audit would consider how consistently the Act is applied (i.e. are policies and procedures inconsistent in any way with the Act); how well the

Your comments:

objects of the Act are met (education and process); a file review (a random check of files to see how well policies and the Act are applied); a review of implementation plans (including the Annual Operational Plan and the Five-year Strategic Plan); and a review of record-keeping methods (how information is gather and released, and how policies are applied).

The financial aspect of the operational audit would include a check of administrative financial practices beginning with an overview of revenue (assessment and revenue) and leading into analysis of expenditures in relation to the Act.

Note: This financial aspect of the operational audit is different from the annual financial audit already required by the Act. The annual financial audit shows 'what was spent'. The financial aspect of the operational audit shows if 'what was spent was spent appropriately'. (see also Category 2 Issue 17 — Board financial decisions).

4. A comprehensive review of the workers' compensation system as established in the *Workers' Compensation Act* should be undertaken every 10 years by an independent body established by the Minister specifically for the purpose of reviewing the legislation.

Questions:

- Does the option balance the need for accountability with the increased cost that will likely result from undertaking the new reporting and evaluation requirements?
- Does the option provide sufficient information to enable client groups to assess performance?
- Is there sufficient opportunity for the client groups to review performance and to monitor changes and improvements in the workers' compensation system?

Issue 16: Board accountability to the public through the Legislative Assembly (continued)

Considerations:

- The board can only be held accountable for those things over which it has control.
- The board must be publicly accountable to workers and employers for how it implements the Act so that the objects and the spirit of the legislation are realized.
- Some measure of independence should be attached to any accountability review to ensure that the board's performance is evaluated by those who are not personally involved in board activities and operation.

What's been said by stakeholders:

- Concern over the lack of reporting back to constituents by members of the Board; should be part of the constituent nominating process or entrenched in the legislation.
- Board should be required to appear before the Legislative Assembly annually.
- Board should be held accountable for its commitments.
- The public should have access to Board directives.
- There is a sense that the board is 'untouchable'.
- Who polices Board members when they act outside of their jurisdiction?

Section References in Yukon *Workers' Compensation Act*:

- Annual report and annual meeting (*see Issues 18 and 19*)

Other Jurisdictions:

- Few jurisdictions include specific accountability mechanisms within their legislation.
- A number of jurisdictions that have recently conducted legislative reviews have either amended their legislation (Ontario) or have proposed legislative amendments (British Columbia) to introduce organizational performance assessments.

Category 2: Board accountability to clients

Issue 17: Board financial decisions

(corresponds to Issues Paper Category 2 Issue 2)

Options:

1. There should be a requirement for an operational audit (paid for ut of the compensation fund) to be held every three years. This audit should be undertaken by an independent body and should be provided to the public upon transmittal to the Minister. The operational audit has both an administrative and financial aspect.

The administrative aspect of the operational audit would consider how consistently the Act is applied (i.e. are policies and procedures inconsistent in any way with the Act); how well the objects of the Act are met (education and process); a file review (a random check of files to see how well policies and the Act are applied; a review of implementation plans (including the Annual Operational Plan and the Five-year Strategic Plan); and a review of record-keeping

Your comments:

methods (how information is gather and released, and how policies are applied).

The financial aspect of the operational audit would include a check of administrative financial practices beginning with an overview of revenue (assessment and revenue) and leading into analysis of expenditures in relation to the Act.

Note: This financial aspect of the operational audit is different from the annual financial audit already required by the Act. The annual financial audit shows 'what was spent'. The financial aspect of the operational audit shows if 'what was spent was spent appropriately'. (see Category 2 Issue 17 — Board financial decisions and Issue 16 — Board accountability to the public).

2. Table in the legislature an Annual Financial Report that is the federal Auditor General's report (or the report of another qualified auditor appointed by Cabinet) as the board's financial report and make this financial report available to the public as soon as it is transmitted to the Minister. (*see Issues 16 and 18*)

Questions:

- What are the cost implications (in dollars and time) of an operational audit every three years?
- How can the board best ensure that its expenditures are balanced with revenues?

Considerations:

- Employers and workers must have confidence in the financial decision-making of the board.
- Expenditures must reflect the objects of the Act in section 1(1).
- The compensation system (assessments, investments and entitlement) must remain balanced (i.e. no indebtedness or bankruptcy of the system).
- The board can be held accountable only for those things that it has the ability to control.

Issue 17: Board financial decisions (continued)

What's been said by stakeholders:

- The board is currently seen as not being accountable to anybody for its fiscal practices and administrative costs.
- Should it not be publicly accountable for significantly increasing assessment rates and administrative costs during a period in which the economy and the number of insured workers declined (e.g. 1997)?
- The perception is that the board has elevated fiscal solvency to be the supreme principle of the Act.
- The cost of the board continues to be an unanswered issue and one that needs to be addressed to determine the actual administrative cost per claim.
- Reduce costs by reducing the occurrence of injury (have inspections, tougher rules and go after delinquent employers).
- Must be some sort of financial accountability to workers who suffer because of board errors.
- With administration costs reportedly consuming 40 to 60 per cent of every assessment dollar (and the revenue/employee base falling), the board must reduce administrative costs before increasing assessment rates to meet projected revenue shortfalls.
- Must be a periodic evaluation of board policies, management and administration to assess numerous concerns related to its high administration costs.
- Want two kinds of standard financial information provided to employers:
    1. reports about board expenditures on administrative, rehabilitation, adjudication and occupational health and safety costs; and
    2. itemised cost statements for each processed claim.
- Issue of administrative costs must come second to compensation.
- The board must be allowed to table the Auditor General's (financial) report as its financial report to the legislature.
- The board's annual report is not a financial report.

Section References in Yukon *Workers' Compensation Act*:

48. The board shall cause an actuarial valuation of the compensation fund to be performed by a fellow of the Canadian Institute of Actuaries at least once every three years, a report of which shall be included in the next report of the board to the Minister under paragraph 93(c).

49.(1) The accounts and financial transactions of the compensation fund are subject to audit of the Auditor General of Canada, or such other auditor as appointed by the Commissioner in Executive Council...

93. The members of the board shall
(c) report to the Minister no later than June 30th of each year, unless directed otherwise by the Minister on all matters regarding the administration of the Act, including reports on
(i) the assets of the compensation fund,
(ii) actuarial reviews of assessment rates,
(iii) actuarial reviews of the liabilities of the compensation fund,
(iv) financial and management practices, plans and policies, and
(v) such other matters as the Minister requests.
(e) The members of the board shall consider and approve operating and capital budgets of the board.

Note: see Issue 18 (annual reports) and Issue 19 (annual information meetings)

Other Jurisdictions:

- In six jurisdictions (British Columbia, Alberta, Manitoba, Ontario, Prince Edward Island, Newfoundland) the Board (or equivalent) has the power to set and approve budgets.
- The general principle established in many statues is that budgets must be balanced by bringing revenues into line with expenditures, and not the other way around.

Category 2: Board accountability to clients

Issue 18: Annual report

(corresponds to Issues Paper Category 2 Issue 3)

Options:

1. Status quo — Continue to publish the current product.
2. Divide annual reporting requirements into two parts:
(i) an audited financial report (presented to the Minister and tabled in the legislature, and made available to stakeholders in a more timely manner);
(ii) a narrative report that covers board planning, administrative activities etc.

Note: If Option 1 in Category 2, Issue 17 is selected, the operational audit would be added to the method of Board accountability to clients and the public.

Questions:

- Could the annual report be better managed in terms of content, production, and delivery to be a useful tool of accountability and accountability?
- Does your preferred option address accountability and communication needs of stakeholders?

Considerations:

- The annual report is intended to be a communication and accountability tool with workers, employers and the general public. It should be informative and available in a timely fashion.

Your comments:

What's been said by stakeholders:

- Need for timely reporting to stakeholders...not good enough that Auditor General signed the 1997 annual report in April 1998 but it wasn't released until March 1999... should be out within six months...
- Not enough data for stakeholders to evaluate the board.
- There seems to be an expectation that the board report in a timely fashion to some stakeholders and not others.
- It takes time for the three parts of the annual report (financial, actuarial, narrative) to come together.
- It's one method of accountability to the public...good that it is tabled in the legislature.
- It's useful, but without a way to question the way the funds are allocated, how is accountability to be achieved?
- It's important but should be condensed (a sales pitch on the WCHSB is not needed), financial statements should be accompanied by management letters from the actuarial firm and the Auditor General (management responses could be included where appropriate).
- Operational financial information should be broken out like any other business statement, itemizing administrative costs (salaries, benefits, expenses etc.).

Section References in Yukon *Workers' Compensation Act*:

49.(6) The annual report of the auditor shall be included in the report referred to in paragraph 93(c) next tabled in the Legislative Assembly.

94. The Minister shall table each report of the board under paragraph 93(c) in the Legislative Assembly within 15 days after it has been published if the Assembly is then sitting, or otherwise within 15 days after the commencement of the next session. *(see Issue 17 Board financial decisions)*

Other Jurisdictions:

- All jurisdictions require some form of annual report — a combination of the activities of the board and its financial audit or just the financial audit. Generally, the annual report must contain specified material and other material as requested by the Cabinet of the jurisdiction.
- All annual reports are tabled in the legislature.
- Deadlines to produce annual reports vary from three to six months after the end of the fiscal year. Manitoba specifies that it must be delivered to the Minister as soon as possible after the end of the calendar year and no later than March 31 of the next year.
- Audits are conducted by the Auditor General or by another auditor appointed by Cabinet who, in some jurisdictions, is required to work under the direction of the Auditor General.

Category 2: Board accountability to clients

Issue 19: Annual information meetings

(corresponds to Issues Paper Category 2 Issue 4)

Options:

1. Status quo – No change to legislation.
2. Set in legislation the timing of annual meetings (i.e. within a certain period of time after the release of the audited financial report).
3. Specify that the administration of the board must provide information on its activities, policies, and future plans and seek input from workers and employers on these matters. (*see Option 2, Category 2 Issue 16 — Annual Operational Plan and Five-year Strategic Plan*).
4. Specify in legislation that the board will produce a report on the annual meeting (or its minutes) to be delivered to everyone who attended the meeting and to others who may want the report or minutes.
5. Delete the requirement for annual meeting.

Questions:

- Does the option address the need to improve the accountability of the board and its communication with stakeholders?

Your comments:

Considerations:

- The annual (information) meeting is intended as another tool of communication and accountability (along with the annual report and other information) for stakeholders and the general public.
- The annual meeting is a time for the WCHSB (administration and Board of Directors) to 'report to' workers and employers on its administration and policies.

What's been said by stakeholders:

- Last year, employers got a copy of the newsletter and the financial report...injured workers don't get this...
- Stakeholders want as much information as possible to evaluate the board.
- We would care if the requirement for the annual information meeting were deleted, but even though it's in the Act, they don't always have one.
- It would be useful if they answered our questions... they never get back to us... Board members have made it a useless tool.
- Only three people showed up at the last meeting...except for staff and some of the Board of Directors...staff people outnumber the others...the board is not a stakeholder, why do they attend meetings?
- One meeting was fairly well attended and there were numerous questions, but there were no answers...not at the meeting or later...the board is a 'fortress' and when stakeholders ask for more information it doesn't come...

Section Reference in Yukon *Workers' Compensation Act*:

95. The members of the board shall report annually to workers and employers on the administration and policies under the Act.

Other Jurisdictions:

- An annual meeting is not specified in the legislation of most other jurisdictions.

Category 2: Board accountability to clients

Issue 20: Client service/satisfaction

(corresponds to Issues Paper Category 2 Issue 5)

Comment:

The issue of client service/satisfaction is a broad one that encompasses many aspects of the interaction between the board and its clients (workers and employers). Many of the comments made by stakeholders about this issue are addressed elsewhere in the Options Paper.

Options:

1. Status quo – Make no legislative change and maintain client service as a policy and management issue.
2. Stress the principles of client service including respect, compassion, fairness, and service in the objects section of the Act.
3. Highlight in legislation a role for the Ombudsman.

Questions:

- Can legislative amendments be effective in enhancing client service specifically?
- Will other proposed legislative amendments assist in enhancing client service?

Your comments:

Considerations:

- Workers and employers must have confidence that the compensation system is operating in a fair and efficient manner.
- Workers and employers must be able to expect courteous and timely service.

What's been said by stakeholders:

- If workers could raise issues with the board in some way other than through an appeal, small issues could be resolved more quickly.
- Injured workers should have access to members of the Board of Directors.
- A legal advisor should be made available to injured workers.
- An independent body could be a useful place (i.e. as a 'sounding board') for workers or employers to raise issues outside of the claims appeal process.
- The Board must be accountable for its policies. Client service satisfaction is a management issue. Claims service satisfaction is a matter for the Board of Directors.
- Regardless of the system, all employees must provide client service in a timely and professional manner. It is impossible to legislate client service; it is about ongoing commitment to continuous improvement.
- This is a 'no fault' system and should provide compassionate and supportive service to clients.
- Improve the current methods of dealing with clients.

Section References in Yukon *Workers' Compensation Act*:

- There are no specific references to client service and satisfaction in the Act.

Other Jurisdictions:

- No specific reference to client service.

Task Force review of the Yukon Workers' Compensation Act

Phase 2
— Options Paper —

Category 3 Issues

Board/Minister Relationship

Category 3: Board/Minister relationship

Issue 21: Role of the Minister

(corresponds to Issues Paper Category 3 Issue 1)

Options:

1. Status quo — No legislative changes to more fully address the role between the Minister and the Board.
2. Enable the Minister to issue directives to the Board on matters relating to the exercise of the powers of the Board and the performance of its duties.
3. Enable the Minister to issue directives to the Board on matters relating to upon the results of the independent operational audit (*see Category 2 Issue 1*).
4. The Board should be required to produce an Annual Operational Plan and a Five-year Strategic Plan that sets out objectives, priority initiatives with measurable outcomes, and sets targets for all performance. Both plans should be tabled in the legislature.
5. Specify in the Act that:
   (a) the Board must respond to ministerial requests for information concerning policy issues;
   (b) the president must respond to ministerial requests for information concerning administrative issues; and
   (c) the Minister has no role in the adjudicative process and may not speak to any one about adjudicative matters.

Questions:

- Is there a risk of political interference in the compensation system if the Minister can provide unfettered policy direction and instruction to the Board of Directors?
- Will the option give the Minister greater appreciation and understanding of where the Board of Directors is taking the organization, *vis à vis* its strategic direction and establishing policy for the compensation system?
- Will the option give the Minister the ability to hold the Board of Directors accountable, on behalf of the public interest, so that the scope and purpose of the compensation system is effectively and appropriately implemented?

Your comments:

Considerations:

- The Minister has a key role in ensuring that the system is working on behalf of the public generally as the compensation system has taken what were previously private disputes between workers and employers and made these disputes part of the public service.
- The Minister must have some ability to interact with the Board so that the objectives and principles of the compensation system are realized and that the *Workers' Compensation Act* is properly and fully implemented.

What's been said by stakeholders:

- The Minister should be able to intervene, even remove members of the Board.
- The president should be accountable to the Minister or the Board, but the president should not be a Board member; should take direction only.
- The Minister should not give direction on entitlement.
- Government should have a say on some aspects of policy, especially on occupational health and safety.
- What is the scope of the Minister's power to give direction?
- There is a potential for political intervention.
- What can be done if the Board does not do what it is supposed to?
- The board should not be allowed to 'interpret' the Act; some other body should do this and the boaru should implement it as directed.

Section References in Yukon *Workers' Compensation Act*:

3. The members of the board shall
(d) report in a timely manner on such matters as the Minister may request.

Other Jurisdictions:

- No jurisdiction specifically addresses the issue of performance evaluations of their Board.
- Few, but an increasing number, of jurisdictions are including provisions that lead to greater linkages between the Minister responsible for the workers' compensation system and the Board.
- These provisions generally impose a requirement on the Board to submit annual operating plans and/or strategic plans and/or detailing the future plans and priorities for the Board.
- In Manitoba the provincial auditor or Cabinet can, at any time, order an audit or investigation into the accounts or affairs of the Board.
- In Ontario the Minister may issue policy directions, approved by Cabinet, to the Board on matters relating to the Board's exercise of its powers and duties.

Category 3: Board/Minister relationship

Issue 22: Appointments to the Board of Directors

(corresponds to Issues Paper Category 3 Issue 2)

Options:

Appointments

1. Status quo – the Act requires consultation with employers, employers organizations, workers, and organized labour before appointments are made.
2. The Act should be amended to establish the qualifications of Board members in terms of knowledge, ability, and understanding of the purposes and objectives of the compensation system.
3. The appointment process should be broadened to ensure that Yukon First Nations, in their role as employers and employees, are appropriately represented on the Board.

Tenure

1. Status quo — appointments are at pleasure.
2. Appointments to the Board should only be revoked for cause.

Your comments:

Questions:

1. Is there a concern about the knowledge and ability of Board members appointed using the current appointment process that could be remedied by outlining qualifications in the Act?
2. Should Board membership be changed to ensure Yukon First Nation representation?
3. Should the tenure of Board appointments be strengthened by ensuring that appointments should be removed for cause rather than removal at the pleasure (with or without good reason) of the Minister?

Considerations:

- Board members must have the necessary knowledge, ability and commitment to fulfil their responsibilities under the *Workers' Compensation Act*.
- Board members must understand the purposes of the compensation system and strive to meet the objectives established in the legislation for the compensation system.
- Board members must be accountable to those whose interests they represent by reporting on the effectiveness of the compensation system.
- Appointments to the Board should be planned so as to maximize continuity in operations and to minimize difficulties associated with turnover of membership given the rigorous and demanding nature of the responsibilities of the Board.
- Appointments to the Board should recognize the cultural and regional diversity of the Yukon, as well as gender balance.
- Board members must have some security of tenure to ensure independence.

Issue 22: Appointments to the Board of Directors (continued)

What's been said by stakeholders:

- Is the public aware of the need for skilled people to sit on the Board? Some Board members do not understand administrative law complexities.
- An all-party committee of the legislature could appoint Board members.
- Appointments should be based on the knowledge of the person but the worker/employer balance must not be lost.
- There is no agreement on whether or not the existing process is inadequate (i.e. how do stakeholders nominate a neutral chair and how is this any less political than an all-party committee of the legislature).
- The question is about quality control and the worker/employer perspective.
- The Minister sometimes selects people who are not on the nomination/selection list.
- Should Yukon First Nation governments be represented on the Board of Directors since they pay assessments? Yukon First Nations may represent both employer and employee interests, but they do not have trade union agreements.
- Some Yukon First Nation injured workers are told by the board to seek help from their First Nation; the shuttling back and forth is frustrating.
- The system needs to recognize and adapt to Yukon First Nation perspectives and concerns. There is also the question of the assessment rate paid by Yukon First Nations as employers. Maybe First Nations will have to create their own compensation laws since the Yukon system doesn't seem to be working well.
- Expand the Board membership to include those who do not have collective agreements (including the general public etc.).

Section References in Yukon *Workers' Compensation Act*:

92.(2) The board shall be appointed by the Commissioner in Executive Council and shall consist of

(a) two members representing employers,

(b) two members representing workers,

(c) a member who will be the chair.

(3) The Commissioner in Executive Council shall appoint an alternate member to the Board to act as chair during the absence of the chair.

(4) The president of the board shall sit as a non-voting member of the board.

(5) For the purpose of making appointments under subsection (2), the Minister shall consult with

(a) employers and employer organizations, about the appointment of members to represent employers,

(b) workers and organized labour, about the appointment of members to represent workers and

(c) employers and workers about the appointment of the chair and the alternate chair.

Other Jurisdictions:

- Four jurisdictions (Saskatchewan, Quebec, Nova Scotia, Prince Edward Island) have equal representation of workers and employers.
- Several jurisdictions (New Brunswick, Newfoundland, British Columbia, Alberta, Manitoba, Northwest Territories) include representatives of the public interest on the Board of Directors.
- Only a few jurisdictions require consultations with employer or worker organizations prior to making appointments.

Category 3: Board/Minister relationship

Issue 23: Role of the Board of Directors

(corresponds to Issues Paper Category 3 Issue 3)

Options:

1. Status quo — Legislation is silent as to the overall duties or responsibilities of the Board in relation to the purposes and objects of the Act.
2. The legislation should clearly state the duties of members of the Board, namely:
   (i) the duty to act in good faith;
   (ii) the duty to act in the best interests of the workers' compensation system; and
   (iii) the duty of confidentiality in discussing and conducting the affairs of the system.

Questions:

- Would the addition of specific duties and responsibilities for the Board enhance the effectiveness of the workers' compensation regime?

Considerations:

- Board members must act in good faith and in the best interests of the compensation system as a whole and in recognition of the fiduciary obligations imposed upon them by the legislation

Your comments:

What's been said by stakeholders:

- The role of the board should be to protect injured workers and prevent injury, not protect the interests of WCHSB.
- The Board should act in the 'best interests' of the employers and workers.
- Role of the Board should be to apply the Meredith Principles, not the worker vs employer interests.
- The Board should act in the best interest of the system, especially since Board members change over time.
- There is concern that the Board has elevated fiscal solvency over everything else in the Act. The system should be funded according to the costs of compensation, not the other way around (i.e. the funding level shouldn't dictate the amount of compensation benefits paid out).

Section Reference in Yukon *Workers' Compensation Act*:

1.(1) The objects of this Act are
(g) to establish a board, independent of government, with equal representation from workers and industry and a neutral chair to administer workers' compensation, health and safety for all industries.

Other Jurisdictions:

- Few jurisdictions specifically describe the duties or role of the Board in terms of their overall purpose and objectives.
- Implicit in most legislation, however, is that the Board of Directors is the 'keeper of the system' and should act in such a way as to fulfil the principles and objectives of the legislation.

Task Force review of the Yukon Workers' Compensation Act

Phase 2
— Options Paper —

Appendices

Appendix 1 — Estimated costs of an independent appeal body

Appendix 2 — Workers' Advocate position

Appendix 3 — Meredith Principles

Appendix 1 — Estimated costs of an independent appeal body

Introduction:

During Phase 1 of the Task Force review, many employers and workers spoke in support of an independent appeal panel. At the same time, they raised questions about the effect that the establishment of a separate body to hear appeals might have on compensation costs, including employer assessment rates. In response, the Task force canvassed some jurisdictions in Canada that have independent appeal panels. No quantitative information on costs was obtained; however, there is qualitative data that suggests the type of increased costs that may be expected. Brief commentaries from two of these jurisdictions follow.

Jurisdiction 'A':

This jurisdiction created an independent appeal panel office to address perceptual concerns of bias and to give the process closure. No appeal budget increases were necessary except to provide for rent and related expenses for the new independent panel. It was necessary, however, to backfill in some cases where board staff became appeal panel staff. At present, appeal panel personnel consists of four full-time commissioners, 12 part-time commissioners and seven support staff, including a registrar and an appeal administrator (technical advisor). The commissioners represent constituencies of labour, business and the public interest.

Its current budget, charged to the accident fund, is about $800,000 to $900,000. Last year, three-member appeal panels heard 265 appeals and made decisions on approximately 85 per cent of these cases. These numbers, however, can fluctuate by as many as 100 appeals in a given year so it is difficult to arrive at a constant average cost per appeal.

The appeal panel, while bound by board policies, makes decisions that are final and binding. It is not known if the creation of an external appeal panel has resulted in higher awards in this jurisdiction, but it has overturned — in whole or in part — an average of 30 to 33 per cent of board decisions in the last eight years.

Jurisdiction 'B':

This jurisdiction has had an independent appeal panel office longer than has jurisdiction 'A'. It hires its own staff and administers its own budget. At present, it employs 175 people who are generally recruited from the public at large. Of this number, 50 are adjudicators and about 80 are involved in preparing files for appeal. Its current budget, charged to the accident fund, is approximately $19 million. By comparison, the overall budget of the board (with about 5000 employees) is approximately $3 billion.

The appeal panel office submits its annual budget to the labour department. The department approves the budget through the legislature and submits it to the board for payment.

The budget has increased 20 per cent in the last three years to accommodate a backlog of 12,000 appeals created by changes to 'limitation of actions' legislation.

The workload has increased correspondingly by about 300 per cent. The appeal panel office is trying to develop ways to fast-track the backlog without compromising the high quality of its decisions. For example, it has reduced the size of an appeal panel from three members to one person with no discernible loss of quality. It has similarly reduced the length of its written appeal decisions by two-thirds (i.e. from 15 to 20 pages to five to seven pages). It is still the policy of the appeal panel, however, to investigate each appeal matter as thoroughly as possible before coming to a final and binding decisions.

A final note:

It is not known if the creation of an external appeal panel has increased the costs of compensation. Prior to 1998, the appeal panel was not bound by board policies and could send back those policies it believed contravened the legislation. It must now comply, despite any reservations.

While it is difficult to determine the actual increased costs that would be associated with an independent appeal panel in the Yukon given the greater administrative requirements and caseload in the provinces, the experiences of jurisdictions 'A' and 'B' suggest that increased costs can be expected in:

- administration (i.e. costs for office space, furniture and equipment and for on-going administration);
- staffing (i.e. some positions would transfer from the Yukon Workers' Compensation, Health and Safety Board if the final appeal function is removed from the Board; however, this 'devolution' would not be so complete as to imply that no net cost increases would be incurred).

Appendix 2 — Workers' advocate positon responsibilities

This is a summary of some of the duties and responsibilities outlined in the position description for the workers' advocate.

The workers' advocate acts as an advocate for injured workers or their dependants to ensure that they know their rights under the *Workers' Compensation Act*.

The advocate provides information, advice and counsel directly to workers on:

- the board's procedures in processing a claim; and
- the policies, procedures and regulations and the Act that relate to a claim or an appeal.

The advocate:

- discusses claims with workers and investigates the factual, legal and medical basis of their claim;
- reviews decisions with the worker;
- works with the claims adjudicator and other board staff to resolve workers' claims;
- helps workers identify alternative courses of action;
- obtains documents for a review or appeal; and
- maintains records for all cases.

The workers' advocate position is also responsible for developing information programs for workers, and helping workers prepare for and present their case in review and appeal hearings. The advocate can also represent workers at their appeal hearings.

The workers' advocate develops and recommends to the Deputy Minister of Justice changes to programs, policies and legislation to improve the claims process and service to injured workers.

The workers' advocate may be called upon to develop speeches, Ministerial Statements, briefing notes and public notices relating to the work of the workers' advocate office, as they are needed.

Appendix 3 — Meredith Principles

In 1910, in response to concerns about a lack of adequate funding for injured workers and a slow, inequitable court system, the Ontario government commissioned Sir William Meredith to produce a report on workers' compensation.

Meredith reviewed systems in the United States, France, Belgium, England, and Germany and recommended a system based on collective liability and a wage-loss approach to calculating benefits.

The main principles of Meredith's report include:

- collective liability, under which all employers share responsibility for benefits to injured workers;
- no fault, under which the worker gains the right to benefits without regard to their negligence, in return for giving up the right to sue;
- universal coverage, under which all workers are eligible for benefits;
- industry funding, under which the entire costs of benefits are covered through levies on employers;
- state administration, under which state assumes responsibility for the collection of employer contributions and the awarding and distribution of benefits to injured workers;
- exclusive jurisdiction, under which the administrative Board the (WCB) has the power to inquire into, re-hear, and re-adjust all issues as necessary;
- security of payment, whereby the worker's claim was separated from the employer's ability to pay and guaranteed by an accident fund under the Board's (the WCB's) administration; and
- calculating benefits based on wage loss, whereby an injured worker received benefits based on a calculation of wages lost as a result of the injury.